the board, there is no sufficient justification for their Lordships to interfere.

Their Lordships will advise the Head of Malaysia that the appeal be dismissed and that the appellant pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Coward Chance & Co.; Stephenson, Harwood & Tatham.*

BERAHIM v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) March 21, 1968]

[K.L. — Federal Court Criminal Appeal No. X.2/68]

Penal Code, 302 and 34 — Murder — Common intention — Summing up — Failure to adequately draw attention of jury to evidence in favour of defence — Misdirection.

The appellant in this case was charged with the offence of murder of one Daud at about 4 p.m. on May 4, 1967 in furtherance of the common intention of himself and two others at large, namely, Mamat and Dollah, an offence punishable under section 302 of the Penal Code, by virtue of the provisions of section 34.

He was tried with a jury in the High Court at Kota Bahru on January 9, 1968 and was convicted and sentenced to death. He appealed against conviction and sentence. The main grounds of appeal were misdirection and failure to adequately draw the attention of the jury to the evidence in favour of the defence, in the summing-up by the trial judge.

Held, allowing the appeal: taking the evidence as a whole, the probability that the fight broke out as a result of provocation offered by the deceased, cannot be ruled out. This aspect of the evidence was never seriously considered and adequately placed before the jury; nor were the probability of a sudden fight or other exceptions which would have reduced the case to culpable homicide not amounting to murder, ever put to the jury. There was, therefore, every likelihood of a miscarriage of justice.

FEDERAL COURT.

Y. S. Lee for the appellant.

K. Somasundaram (Deputy Public Prosecutor) for the respondent.

MacIntyre F.J.: The appellant in this case was charged with the offence of murder of one Daud bin Saman at about 4 p.m. on May 4, 1967 in furtherance of the common intention of himself and two others at large, namely, Mamat and Dollah, an offence punishable under section 302 of the Penal Code, by virtue of the provisions of section 34.

He was tried with a jury in the High Court at Kota Bharu on January 9, 1968 and was convicted and sentenced to death. He now appeals against conviction and sentence. The main grounds of appeal are misdirection and failure to adequately draw the attention of the jury to the evidence in favour of the defence, in the summing-up of the trial judge.

The case against the appellant hinges on a presumption of common intention to murder, which the prosecution sought to draw from the uncorroborated testimony of P.W.3, a brother of the deceased. P.W.3 testified that at 9 a.m. on the day in question, he had at the request of the appellant conveyed an invitation to the deceased to see the appellant at his house. Later, when in response to the invitation he had accompanied the deceased to the appellant's house, one Mamat, who was waiting in the house with one Dollah and the appellant, attacked the deceased with a parang. When therefore, he had tried to stop the assault, he was struck by the appellant with an axe injuring his arm: whereupon he had run out of the house and escaped. Later, the deceased's body was removed from the appellant's house by the police.

Common intention was sought to be presumed from the allegation that (a) the appellant invited the deceased to his house; and (b) that the deceased was attacked by Mamat the moment he entered the appellant's house.

However, the appellant made a statement from the dock, according to which, he claimed that while he was in his house with Mamat and Dollah, the deceased and P.W.3 arrived and upon seeing Mamat, the deceased said "Now we have met." Mamat replied "Boleh lah." Whereupon the deceased drew a knife from his waist and attempted to stab Mamat and the latter had thereupon picked up an axe resulting in a fight between them. In the meantime, another fight ensued between P.W.3 and Dollah, in which the former was armed with a golok and the latter with a parang. When therefore he had shouted to the parties to get out of his house, P.W.3 left followed by Dollah.

Now, P.W.3 had denied seeing the deceased carrying or using a knife, but the police did discover a knife from the scene of the fight, lying beside the deceased's body, in a position suggestive of it having been used by him. This evidence is consistent with the appellant's version of the fight. The attention of the jury was not drawn to this fact.

The story of the alleged invitation issued by the appellant to the deceased, again rests on the uncorroborated evidence of P.W.3. His recollection of what was said by the appellant when he issued the invitation seems to have become more vivid with the passage of time. At the preliminary enquiry he testified that he was not told the reason why his brother was invited. At the trial, in the course of cross-examination, he remembered he was told that the reason was to discuss a small matter. In re-examination he said as follows: "I did ask, during conversation, what the two strangers were called and was told they were Mamat and Dollah. Our kampong is small, and therefore it is natural for me to find

out the names of strangers." This bit of evidence implies that the invitation was for meeting Mamat and Dollah as well. The fact that this evidence came out for the first time in re-examination must raise some doubt on the credibility of this witness. It appears as if that this evidence was deliberately concocted to bolster up the theory of conspiracy; and yet, the learned trial judge in his summing up dismissed the variations in the story as of little importance.

Another unusual feature about this case which militates against the theory of conspiracy is this: Would a conspirator seek to establish evidence against himself by inviting the victim to visit his house through an invitation issued through the deceased's brother?

Again, there can be no doubt that P.W.3 is a biased witness since the victim was his brother and he himself was injured by the appellant. It is also significant that when he was asked by a relative, one Senik bin Kedol, to whom he had gone immediately after the fight with a request to attend to his injury and to look for his brother, how he had come by the injury and with whom his brother had fought, he would not reply. That surely could not have been the conduct of an innocent victim of a pre-meditated attack but rather that of a person who was afraid to tell the truth and had something to hide. The jury should have, therefore, been warned to accept the evidence of this witness with the greatest of caution and yet the trial judge, in his summing up had commended him to the jury as witness of truth.

Taking the evidence as a whole, the probability that the fight broke out as a result of provocation offered by the deceased, cannot be ruled out. This aspect of the evidence was never seriously considered and adequately placed before the jury; nor were the probability of a sudden fight or other exceptions which would have reduced the case to culpable homicide not amounting to murder, ever put to the jury. There was, therefore, in our opinion, every likelihood of a miscarriage of justice and the appeal must be allowed.

Appeal allowed.

CHUNG KHIAW BANK LTD. v. BAJAJ TEXTILES LTD. & ANOR.

[O.C.J. (Winslow J.) April 10, 1968]
[Singapore — Motion in Suit No. 63 of 1968]

Practice and Procedure — Injunction — Interlocutory — Delay — Whether should be granted — Agreement for lease — Unexplained delay — Third party in possession — Alternative accommodation — Whether irreparable harm was caused.

Specific performance — Granting of — Agreement for lease — Third party let into possession.

By three indentures of mortgage the defendants charged certain premises to the plaintiffs in consideration of the plaintiffs according overdraft facilities to the defendants. Subsequent to these indentures the parties entered into an agreement for a lease whereby the defendants agreed to grant a lease of a portion of the ground floor of the premises. The agreement for lease made no reference to any of the indentures. On November 5, 1967, the defendants indicated to the plaintiffs that they were not disposed to proceed with the agreement for lease and on December 12, 1967, they further intimated to the plaintiffs that the ground floor and the first floor of the premises in question had been let to a departmental store. On or about December 20, 1967 the departmental store went into occupation of the premises in question and on January 15, 1968, it officially opened for business.

By a motion dated December 12, 1967, the plaintiffs applied for an interlocutory injunction restraining the defendants until further order from letting or parting with the possession of that portion of the premises which formed the subject matter of the agreement for lease. The defendants resisted the application on the grounds that the grant of the lease depended on the giving by the plaintiffs of overdraft facilities as evidence by the last of the three indentures of mortgage and the failure of the plaintiffs to accord such facilities resulted in the indentures of mortgage and the agreement for lease falling to the ground. Further an interlocutory injunction should not be granted because the plaintiffs had been dilatory which resulted in a third party being let into possession. Finally, if the defendants were at fault, the plaintiffs would be sufficiently compensated by damages since they had been offered alternative accommodation.

Held, dismissing the motion: (1) whether the plaintiffs were in breach of any obligation under the third indenture of mortgage was a question to be finally determined at the trial;

(2) if the agreement for lease and the third indenture of mortgage were not connected it was doubtful whether the plaintiffs would be likely to succeed in a claim for specific performance on the basis of the agreement standing by itself;

(3) there was ample time for the plaintiffs to have initiated an action and in failing to do so they were guilty of an unexplained delay and this delay resulted in a third party being let into possession of the premises in question;

(4) if an interlocutory injunction was granted the court would in effect be ordering the defendants to take steps to eject the present occupiers. The court could not order the doing of an act which it could not control;

(5) since the defendants had already offered alternative accommodation in the same building to the plaintiffs it was doubtful whether in such circumstances the failure to reserve the particular portion of the ground floor for the plaintiffs had caused them irreparable injury for which an injunction was the only redress;

(6) this case, therefore, was not a proper one for an interlocutory injunction.

Cases referred to:—

(1) *Deverell* v. *Milne* (1918), 34 T.L.R. 576.

(2) *Daniel* v. *Ferguson* [1891] 2 Ch. D. 27.

MOTION FOR INTERLOCUTORY INJUNCTION.

C. F. J. Ess for the plaintiffs.

J. Grimberg for the defendants.

Cur. Adv. Vult.

Winslow J.: By motion dated 12th January, 1968 the plaintiffs applied for an interlocutory